

**Plaintiff  
Jackie Fisher's  
Response in Opposition  
to Defendants'  
Motion for  
Summary  
Judgment**

**EXHIBIT**

**51**

<b>UTMB TDCJ MANAGED CARE NURSING DEPARTMENTAL MANUAL</b>	<b>Effective Date:</b>	8/95	<b>NUMBER: A-06.2</b>
	<b>Revised:</b>	01/04	
	<b>Replaces:</b>	1-5A	
	<b>Formulated:</b>	9/93	

## **NURSING PEER REVIEW PLAN**

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**AUTHOR:** Mary Gotcher, FNP-C

**SCOPE OF PRACTICE:** All licensed nursing personnel (LVN and RN)

**PURPOSE:** This policy is designed to fulfill the requirements of the Texas Civil Statutes Article 4513 (professional nursing) and Article 4528c (vocational nursing). The responsibility of the peer review committee is to determine if a patient received adequate nursing care, whether nursing standards were met, and what complaints constitute reportable behavior and what complaints will be reported.

**PLAN:** A written Nursing Peer Review Plan has been developed by UTMB-CMC. This plan includes the complete process for Nursing Peer Review and addresses all required aspects by our governing boards.

See attached:  
**Peer Review Plan**  
**Safe Harbor Review Plan**

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### **Peer Review Plan**

#### **Purpose**

The purpose of this plan is to set out the policies and procedures that will govern peer review of licensed vocational nurses (LVNs) and registered nurses (RNs) providing nursing care at the University of Texas Medical Branch – Correctional Managed Care. These policies and procedures are designed to assure that peer review is conducted in accordance with Chapter 303 of the Occupations Code (relating to nursing peer review) and the Board of Nurse Examiners Rule 217.19 (relating to minimum due process), and that the committee operates in good faith in carrying out its responsibilities.

"Peer Review" means the evaluation of nursing services, the qualification of nurses, the quality of patient care rendered by nurses, the merits of complaints concerning nurses and nursing care, and determinations or recommendations regarding complaints.

The peer review is designed to provide a process for fact finding, analysis and evaluation of events including a nurse in a climate of collegial problem solving focused on obtaining all relevant information about an event, to assure the nurse due process, to make a determination if the nurse engaged in conduct reportable to the BNE or BVNE, and to make recommendations for corrective actions.

#### **Reporting to the UTMB-CMC Nursing Peer Review**

Reports may be made to the Nursing Peer Review Committee regarding RNs or LVNs involved in practice related incidents by:

- Registered Nurse or Licensed Vocational Nurse
- Other health care practitioners
- Hospital personnel
- Administrative personnel
- Consumers

Reporting to the Nursing Peer Review Committee and review and recommendations by the committee do not in any way replace or preclude routine management disciplinary processes or grievance procedures.

Practice incidents involving RNs or LVNs where the mandatory reporting requirements to the respective licensing boards are unclear may be reported to the committee.

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### **Committee Membership**

The committee will review the practice of both RNs and LVNs and will consist of at least 60% RNs and 80% RNs and LVNs. LVNs will be on the committee unless not feasible.

When a RN is being reviewed, only RNs will vote. When a LVN is being reviewed both RNs and LVNs will vote.

Two core members will serve as facilitators for individual peer review. The facilitator serves as an agent of the Review Panel. The facilitator role may include: an information source for the review panel, fact finding, acquisition of materials/documents requested by the review panel, drafting of committee documents relative to review and review panel findings and other activities requested by the review panel.

Committee members will be compensated for time served on the committee.

### **Timelines**

The committee will comply with the following time lines unless waived in writing by both parties after peer review is initiated. They may NOT be waived in advance.

<b>Notice to Nurse</b>	Not less than 21 or more than 45 calendar days from meeting of committee and promptly after decision is made to conduct peer review of nurse.
<b>Nurse Provided Opportunity</b>	At least 15 calendar days before meeting of Committee, Nurse or attorney may review files.
<b>Meeting of Committee</b>	Not less than 21 or more than 45 calendar days from date of notice to nurse.
<b>Decision of Committee</b>	Not more than 14 calendar days from the Committee meeting stated in the notice.
<b>Notice to Nurse of Decision</b>	Within 10 calendar days of decision.
<b>Filing of Rebuttal Statement</b>	Not more than 10 calendar days after receipt of Notice of Decision.
<b>Report to BNE/BVNE</b>	Timely

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### **Notice**

All notices shall be by either certified mail, return receipt requested or personal delivery with signed receipt (or signed statement by person delivering if receipt is refused). If notice is sent by certified mail a duplicate original will be sent at the same time by first class mail.

### **Confidentiality**

Chapter 303 requires that all peer review proceedings be confidential and that the identity of patients be protected. All participants, including the nurse being reviewed shall maintain confidentiality of the peer review process and protect patient identity. All participants will be required to sign a statement affirming the confidentiality process and agreeing that they will abide by procedures to maintain confidentiality. At each meeting the chair will remind participants of the need to maintain confidentiality. The following guidelines will apply:

1. Only the chair shall disclose information. All disclosures will comply with the Nursing Peer Review Law (Chapter 303, Occupations Code).
2. A member, agent or employee of the committee, the nurse being reviewed, witnesses or any other participant in any peer review proceedings may not voluntarily disclose any communication to the committee or any record or proceedings of the committee. Nor may they be required to disclose such information.
3. Any person who attends any proceeding of the committee may not voluntarily disclose any information acquired or disclose any opinion, recommendation, or evaluation of the committee or any member of the committee. Nor may they be required to disclose this information.
4. Members of the committee and participants may not be questioned about their testimony or about opinions formed as a result of the committee proceedings.
5. Peer review committees are required to protect to the extent possible the identity of patients.
6. The nurse's consulting with her/his attorney does not constitute a breach of confidentiality.

### **Initiation of Peer Review**

Committee review will be initiated by the filing of a written and signed report, identifying the nurse, and a brief description of the incident. The report may come from any of the following to include but not be limited to:

- Director of Facility Nursing Services
- Senior Cluster Nurse Managers
- Facility Nurse Managers/Cluster Nurse Managers
- RN's and LVN's
- Other health care practitioners

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- Facility Personnel
- Board of Nurse Examiners
- Quality Management Committee
- UTMB TDCJ Administrative Personnel

### **Preliminary Investigation**

The chair or the chair's designee shall conduct an initial inquiry to determine if peer review of a nurse is appropriate.

### **Notification of Nurse**

Once the decision is made that a nurse should undergo peer review, the nurse shall be promptly notified in writing that she/he will be subject to peer review. The notice shall comply with BNE Rule 217.19 and include a description of the event(s) to be evaluated in sufficient detail to inform the nurse of the incident, circumstances and conduct, including date(s), time(s), location(s), and individual(s) involved. Initials or number shall identify the patient/client; and the Review of Documents name, address, telephone number of a contact person to receive the nurse's response will be included. The notice shall be sent by certified mail, return receipt requested, or personally delivered to the nurse and receipt acknowledged in writing. If sent certified mail, a duplicate notice shall be sent first class mail.

### **Investigation**

The committee chair or the chair's designee shall conduct an investigation including relevant documents and interviewing of witnesses. The nurse being investigated may be interviewed and given the opportunity to submit a written statement. The results of the investigation shall be reported to the committee chair.

### **Review of Documents by Nurse**

At least 15 calendar days before the date of the committee meeting as set out in the original notice to the nurse, the nurse, the nurse's attorney or the nurse and the attorney together shall be given the opportunity to review documents relating to the incident(s) involved. The review will occur in the committee chair's office or other location designated by the chair. The nurse or the nurse's attorney shall not be permitted to remove any records from the office or to make copies of any records without the written authorization of the chair.

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### **Meeting**

#### **1. Agenda**

The meeting of the committee will adhere to the following agenda:

- Opening statement by the chair on purpose, process, confidentiality, etc.
- Summary of the alleged incident by the Chair, Agent or Investigator
- Opening statement by nurse
  - Presentation of evidence – Documentary evidence or witnesses
  - Response by nurse
  - Questions from committee members and responses from nurse
  - Presentation of nurses witnesses
  - Closing statement by nurse
  - Statement by the chair on deadline for committee decision and how decision is to be communicated to nurse.

### **Evidence**

Peer review is not a legal proceeding and the rules of evidence used in court proceedings will not apply. Evidence and facts normally relied on by reasonable persons including hearsay evidence will be accepted with consideration being given to its source, its credibility and the nature of the evidence. Witnesses will be subject to questioning by members of the committee and the nurse.

### **Nurse's Participation in Meeting**

The nurse may be present throughout the meeting and will be given the opportunity to make an opening statement, call witnesses, question witnesses, and be present when testimony or evidence is being presented, ask questions and respond to questions of the committee, and make a closing statement after all evidence is presented.

### **Involvement of Attorneys**

Both the nurse and facility have the right to consult with an attorney. The nurse's attorney shall have the right to review documents relating to the incident under review as provided above. Attorneys will not be allowed to be present at the committee's discussion and deliberations. The nurse's attorney may be present at the meeting when the nurse is present and consult with the nurse. If either the nurse or the facility intends to have their attorney at the meeting, they must notify the other in writing at least 7 calendar days in advance. The

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other party need not give notice to have their attorney present. Failure to do so will waive the right to have an attorney present. Any modification of this paragraph must be in writing and signed by the nurse and the committee chair or the chair's designee.

### **Decision of Committee, Summary of Findings, Notification of Nurse**

The committee shall make its decision no later than 14 calendar days after the committee meeting; a Summary of Findings shall be promptly prepared. The decision shall include whether the nurse engaged in reportable conduct, what corrective action is recommended and whether the committee recommends the licensing board take formal disciplinary action against the nurse. The nurse will be promptly notified in writing of the committee's decision that shall not be more than 10 calendar days after the decision. The notice shall include the Summary of Findings and explain the nurse's right to submit a rebuttal statement.

### **Rebuttal Statement**

The nurse shall have the right to submit a rebuttal statement responding to the committee's findings and shall be given at least 10 calendar days after the notification of the committee's determination. The statement shall be of reasonable length not exceeding 1500 words and shall not include any patient identifying information. The committee chair or designee shall review the statement and delete any patient identifying information. Any part exceeding the maximum length of the statement may also be deleted. The nurse's rebuttal statement will be made a permanent part of the committee's findings and included whenever the committee's findings are disclosed.

### **Reporting of Nurse to BNE and BVNE**

RNs found to have engaged in reportable conduct will be reported to the BNE unless the conduct is found to constitute a minor incident as defined by BNE Rule 217.16. The committee's report will include what corrective action was taken and the committee's recommendation as to whether the BNE should take formal disciplinary action against the RN. The report will include the Summary of Committee's Findings and the nurse's Rebuttal Statement.

The NPA mandates reporting of RNs by peer review. There is no similar requirement for reporting LVNs in the Vocational Nurse Act. However, reporting LVNs to the BVNE is a permitted disclosure under Chapter 303. Rule 217.19 requires committee to report both RNs and LVNs.

A "minor Incident" is defined by Texas Civil Statutes, Article 4525a, 6A(b) as "conduct that

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does not indicate the nurse's continuing to practice professional nursing poses a risk of harm to the client or other person." An RN involved in an incident, which is determined to be minor, need not be reported to the Board or the Peer Review Panel if all of the following factors exist.

- The potential for risk of physical, emotional, or financial harm to the client due to the incident is very low;
- The incident is a one time event with no pattern of poor practice;
- The RN exhibits a conscientious approach to and accountability for his/her practice; and
- The RN appears to have the knowledge and skill to practice safely.

Other conditions which may be considered in determining that mandatory reporting is not required are:

- The significance of the event in the particular practice setting;
- The situation in which the event occurred; and
- The presence of contributing or mitigating circumstances in the nursing care delivery system.

A minor incident need not be reported to the Board of Nurse Examiners. When a decision is made that the incident is minor, the following steps are required:

- The Nurse Manager shall maintain a record of each minor incident involving those RNs and LVNs under his/her supervision.
- The Nurse Manager shall assure that the report contains a complete description of the incident, patient record number, witnesses, RN/LVN involved and action taken to correct or remediate the problem;
- The Nurse Manager shall report a RN or LVN to the Peer Review Committee if three minor incidents involving the RN or LVN are documented within a one year time period, unless circumstances of the second incident warrant reporting.
- A Peer Review Committee shall review the three minor incidents and make a determination as to whether a report to the Board is warranted.

Nothing in this rule is intended to prevent reporting of a potential violation directly to the Board.

Failure to classify an event appropriately in order to avoid reporting may result in violation of the mandatory reporting statute.

### **Reporting of Findings to Facility**

The chair will report the findings of the Peer Review Committee to the UTMB-CMC Facilities Director of Nursing or his/her designee. Section 303.007 of the Nursing Peer Review Act permits disclosure of peer review findings to the facility under whose authority the committee is

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established. Review of findings with other administrative/supervisory personnel will be based upon a need to know basis.

#### **Confidentiality and Disclosure**

Confidentiality and disclosure information shall be in accordance with the provisions of Chapter 303. Sec. 303.306 and Sec. 303.007 of the Nursing Peer Review Act.

**Disclosure:** The review panel is responsible for limited disclosure under the Act. The chair or the chair's designee, on behalf of the review panel, shall make legally authorized disclosure of its findings. Disclosure may be made in consultation with the Legal Review Services for UTMB-CMC and/or the Facilities Director of Nursing.

#### **Waiver of Rights**

The nurse may waive any right or timetable provided the nurse under this plan. Any waiver shall be made only after peer-review is initiated, be in writing and signed by the nurse and the committee chair or the chair's designee.

#### **Nurses Experiencing Problems with Chemical Dependency**

If there is reason to suspect the nurse's conduct results from mental illness or chemical dependency, the nurse will be referred to the Texas Peer Assistance Program for Nurses and peer review suspended or terminated.

#### **Record Keeping**

One copy of the proceedings of the peer review panel and its findings shall be maintained in a separately secured file in a secure place designated by the Facilities Director of Nursing. The records are protected from discovery by all applicable Federal and State regulations related to activities of health professionals. Retention of the records are congruent with Texas State Regulations. Peer Review Records shall not be placed in personnel files.

#### **Participation of Employees in Peer Review**

Any RN or LVN employed directly or contractually by UTMB-CMC shall participate in the peer review process as outlined in this plan.

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### Safe Harbor Review

#### Purpose

This policy is designed to fulfill the requirements of the Texas Civil Statutes Article 4513 (professional nursing) and Article 4528c (vocational nursing). The responsibility of the peer review committee is to determine if a patient received adequate nursing care, whether nursing standards were met, and what complaints constitute reportable behavior and what complaints will be reported.

#### Plan

A written Nursing Peer Review Plan has been developed by UTMB-CMC. This plan includes the complete process for Nursing Peer Review and addresses all required aspects by our governing boards.

**Nursing Safe Harbor Review – Applies to both RN's and LVN's employed with the organization.**

#### Request for Peer Review: Committee Determination

If a person who regularly employs, hires, or otherwise contracts for the services of at least 10 nurses requests one of those nurses to engage in conduct that the nurse believes violates a nurse's duty to the patient, the nurse may request, on a form produced by the board, a determination by a nursing peer review committee under Sec. 303.005 of the Nursing Peer Review Act of whether the conduct violates a nurse's duty to a patient.

**Duty to a Patient** means conduct required by standards of practice or professional conduct adopted by the board, including administrative decisions directly affecting a nurse's ability to comply with that duty. These definitions are specified in the following board rules:  
**Rule 217.11 Standards of Professional Nursing Practice**  
**Rule 217.12 Unprofessional Conduct**

The determination of the peer review committee shall be considered in a decision to discipline the nurse, but the determinations are not binding if a nurse administrator believes in good faith that the peer review committee has incorrectly determined a nurse's duty.

A nurse's rights under this section may be nullified by a contract.

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An appropriate licensing agency may take action against a person who violates section 303.005.

During this review, a "safe harbor" is created for the nurse in the Act as follows:

A registered nurse who in good faith requests a peer review determination under Subsection (b):

- 1. may not be disciplined or discriminated against for making the request;
- 2. may engage in the requested conduct pending the peer review;
- 3. is not subject to the reporting requirements under Subchapter 1, Chapter 301 of the Nursing Practice Act; and
- 4. may not be disciplined by the board for engaging in that conduct while peer review is pending.
- The nurse must notify the person making the request or assignment to the nurse that the nurse believes in good faith that the nurse's duty to the patient would be violated if the nurse carried out the assignment or complied with the request. The nurse must discuss the reason for his/her belief with the person making the assignment. This must be done at the time the assignment is made. If the nurse is still not able to determine that compliance with the supervisor's request would violate the nurse's duty, the nurse manager of the facility is contacted and the issue is discussed with the Nurse Manager. If the issue remains unresolved the Nurse Manager will contact the Senior Cluster Nurse Manager for discussion and advice. If the issue remains unresolved the nurse will advise the Senior Cluster Nurse manager that he/she is invoking the safe harbor peer review provision of the Nursing Practice Act.
- The request for peer review committee determination must be submitted to the Nurse Manager, in writing on the board's required form, as soon as possible thereafter. The form is available on the BNE website: <http://www.bne.state.tx.us> (The nurse completes Part 2 of this form and delivers it to the Nurse Manager).
- The Nurse Manager completes Part 2.9 of the BNE Form and transmits the form to the Senior Cluster Nurse Manager.
- The Senior Cluster Nurse Manager reviews Part 2.11 of the form and documents his/her action and transmits the form to the Chair of the CMC Nursing Peer Review Committee.
- If the review involves medical reasonableness of a physician's order, the medical director shall make the determination of medical reasonableness and complete Part 3 of the BNE form.
- The Nursing Peer Review Committee convenes and includes ad hoc members as outlined in the CMC Nursing Peer Review Plan. The committee completes its review process and makes a determination within 14 days of the date the nurse's request for peer review, completes Part 4 and delivers the form to the Director of Facility Nursing for Correctional Managed Care.

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- The Director of Facility Nursing for CMC or administrative designee reviews the peer review panel findings within 48 hours of the Peer Review Panel's report and completes Part 5 of the BNE form and returns it to the nurse.
- The nurse should retain the completed form with all attachments under reasonable safekeeping.
- The completed form is sent to the BNE only on specific request or subpoena.
- The determinations of the peer review committee panel shall be considered in a decision to discipline the nurse, but the determinations are not binding if a registered nurse administrator believes in good faith that the peer review committee has incorrectly determined a registered nurse's duty.
- The safe harbor review process provides an opportunity for good faith negotiation between the nurse and nursing management, in the peer review process. If the duty issue is resolved at any point in administrative review, the review is over, the process stops, notation is made on the BNE form and the form is returned to the nurse who initiated the request for peer review.

**References :**

Texas Board of Nurse Examiners Rules/Regulations

    217.11 Standards of Practice Rule (BNE)  
     217.12 Unprofessional Conduct Rule (BNE)  
     217.20 Safe Harbor Review Rule (BNE)

Texas Board of Vocational Nurse Examiners  
     Rules/Regulations  
     239.11 BVNE Rule